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Chia Sia Chek v Ketua Pengarah Kastam, Jabatan Kastam Diraja Malaysia & Ors

B

HIGH COURT (ALOR STAR) — ORIGINATING SUMMONS NO 24–805 OF 2006
ZAMANI A RAHIM JC
12 JUNE 2008

C

Customs and Excise — Uncustomed goods — Possession — Motorcar with replaced engine — Seizure by customs officers — Whether motorcar proved to be uncustomed goods — Customs Act 1967 ss 114, 115, 132

D

The plaintiff was the fourth registered owner of a Honda Civic motorcar bearing registration No PDD 8281 ('the original motorcar'). While the original motorcar was in the possession of the third registered owner it was badly damaged in a road accident. The badly damaged original motorcar was
E then sold to Syarikat Chin Huat by way of tender. After the damaged original motorcar was satisfactorily repaired ('the repaired motorcar') the plaintiff bought it and duly registered it in his name. The second defendant, the Registrar of Motor Vehicles, is under a duty under ss 10 and 12 of the Road Transport Act 1967 ('the RTA') to inspect every vehicle submitted for
F registration or transfer of registration. Accordingly the plaintiff submitted the repaired motorcar to the second defendant for registration ie the repaired motorcar was brought to the second defendant to be inspected and to be weighed and measured, if necessary. If the physical structures of the repaired motorcar are not identical with the registration certificate then the second
G defendant is under a duty to withhold its approval or to make the necessary amendments. In the meantime, the plaintiff had applied to the Road Transport Department, Penang for the engine of the repaired motorcar to be replaced. The second defendant duly approved the replacement of the engine pursuant to s 17 of the RTA. In this case the second defendant had not
H withheld its approval for the registration of the car in the name of the plaintiff and the only amendment made by the second defendant in respect of the repaired motorcar was that the old engine number was cancelled and replaced by a new engine number. The repaired motorcar was used without interruption for almost two years by the plaintiff before it was detained and
I seized by an officer of the first defendant. The first defendant, which had the power to seize goods which contravene the Customs Act 1967 ('the Act'), asserted that they had seized the repaired motorcar as they had reasonable cause to suspect that the plaintiff's motorcar was uncustomed goods under the Act. Upon seizure the car was immediately sent to the Department of

Chemistry Malaysia for examination where it was certified that the entire panel of the chassis was cut and replaced and that the new engine number had not been tampered with. The investigation conducted by the first defendant did not establish that the repaired motorcar was uncustomed goods and therefore did not institute any prosecution against anyone including the plaintiff. The plaintiff thereafter wrote repeatedly to the first defendant requesting that the repaired motorcar be released under s 115 of the Act pending completion of the investigation. However, when the first defendant failed to temporarily release the repaired motorcar the plaintiff filed an originating summons seeking declarations and damages. It was the plaintiff's contention that as there was no reasonable cause before or at the time of the seizure to justify the detention of the repaired motorcar, the plaintiff was entitled not only to an order for the return of the repaired motorcar but also damages under s 132 of the Act.

Held, allowing the plaintiff's application with costs:

(1) The cumulative facts and circumstances in this case went to show that the repaired motorcar was not established to be uncustomed goods. In fact a representative of the first defendant had said that no offence had been committed in relation to the repaired motorcar under the Customs Act but that the repaired motorcar would therefore be handed over to the second defendant for investigation under the RTA. However, the plaintiff's motorcar was never handed over to the Road Traffic Department but instead the plaintiff was informed in writing that the plaintiff's case was being further investigated under the Act. This showed the first defendant's indecisiveness and also that their investigation was coming to a dead end. At the end of the day, the plaintiff was a bona fide purchaser in good faith and the repaired motorcar that was seized from his possession was registered in his name (see paras 18 & 28).

(2) The customs officer who suspected the repaired motorcar to be uncustomed goods did not affirm any affidavit to depose that fact. His affidavit evidence did not show the circumstances that had triggered reasonable cause or reason to suspect that the repaired motorcar was uncustomed goods. In the absence of such reasonable cause, the seizure and detention of the repaired motorcar was unlawful (see para 12).

[Bahasa Malaysia summary

Plaintif adalah pemilik berdaftar yang keempat ke atas sebuah kenderaan Honda Civic yang bernombor pendaftaran PDD 8281 ('kenderaan asal'). Semasa kenderaan asal di dalam milikan pemilik berdaftar ketiga, ianya telah

A mengalami kerosakan yang teruk di dalam satu kemalangan jalan raya. Kenderaan asal yang rosak teruk tersebut kemudiannya telah dijual kepada Syarikat Chin Huat secara tender. Selepas kerosakan kenderaan asal diperbaiki ('kenderaan yang telah dibaiki') plaintif telah membelinya dan mendaftarkannya atas namanya. Defendan kedua, Pendaftar Kenderaan B Bermotor, adalah bertanggungjawab di bawah ss 10 dan 12 Akta Pengangkutan Jalan 1967 ('APJ') untuk memeriksa setiap kenderaan yang dikemukakan untuk pendaftaran atau perpindahan pendaftaran. Plaintif telah mengemukakan kenderaan yang telah dibaiki tersebut kepada defendan C kedua untuk pendaftaran iaitu kenderaan yang telah dibaiki tersebut telah dibawa kepada defendan kedua untuk diperiksa, ditimbang dan diukur, jika perlu. Jika struktur fizikal kenderaan yang telah dibaiki tersebut tidak sama dengan sijil pendaftaran, defendan kedua adalah bertanggungjawab untuk tidak meluluskan atau membuat pindaan yang sewajarnya. Sementara itu, D plaintif telah memohon kepada Jabatan Pengangkutan Jalan, Pulau Pinang untuk menukar enjin kenderaan yang telah dibaiki tersebut. Defendan kedua telah meluluskan pertukaran enjin tersebut menurut s 17 APJ. Dalam kes ini, defendan kedua tidak menahan kelulusannya untuk mendaftarkan kereta tersebut atas nama plaintif dan pindaan hanya dibuat oleh defendan kedua E berkenaan dengan kenderaan yang telah dibaiki tersebut bahawa nombor enjin lama telah dibatalkan dan digantikan dengan nombor enjin yang baru. Kenderaan yang telah dibaiki tersebut telah digunakan oleh plaintif tanpa gangguan selama kira-kira dua tahun sebelum ianya ditahan dan disita oleh F pegawai defendan pertama. Defendan pertama, yang memiliki kuasa untuk menyita barangan yang bertentangan dengan Akta Kastam 1967 ('Akta'), menegaskan bahawa mereka telah menyita kenderaan yang telah dibaiki tersebut kerana mereka mempunyai sebab yang munasabah untuk mengesyaki bahawa kenderaan plaintif adalah barangan tak berkastam G di bawah Akta. Apabila disita, kereta tersebut dengan segera telah dihantar ke Jabatan Kimia Malaysia untuk pemeriksaan di mana ianya telah diperakui bahawa kesemua panel casis telah dipotong dan diganti dan dengan itu nombor enjin baru tidak dapat diubah. Siasatan yang telah dijalankan oleh defendan pertama tidak membuktikan bahawa kenderaan yang telah dibaiki H tersebut adalah barangan tak berkastam dan oleh itu tidak memulakan apa-apa pendakwaan terhadap sesiapa pun termasuk plaintif. Plaintif kemudiannya telah berulang kali menulis kepada defendan pertama meminta agar kenderaan yang telah dibaiki tersebut dilepaskan di bawah s 115 Akta sementara menunggu siasatan. Tetapi, apabila defendan pertama gagal untuk I melepaskan secara sementara kenderaan yang telah dibaiki tersebut, plaintif telah memfailkan saman pemula memohon deklarasi dan ganti rugi. Adalah penegasan plaintif bahawa dengan tiadanya sebab munasabah sebelum atau pada masa penyitaan untuk menjustifikasikan penahanan kenderaan yang telah dibaiki tersebut, plaintif bukan saja berhak kepada perintah untuk

pengembalian kenderaan yang telah dibaiki tersebut tetapi juga ganti rugi di bawah s 132 Akta tersebut. A

Diputuskan, membenarkan permohonan plaintif dengan kos: B

(1) Fakta-fakta dan keadaan-keadaan kumulatif di dalam kes ini menunjukkan bahawa kenderaan yang telah dibaiki tersebut tidak dibuktikan barangan tak berkastam. Sesungguhnya, wakil defendan pertama telah menyatakan bahawa tiada kesalahan telah dilakukan berkenaan dengan kenderaan yang telah dibaiki tersebut di bawah Akta Kastam tetapi kenderaan yang telah dibaiki tersebut seharusnya diserahkan kepada defendan kedua untuk siasatan di bawah APJ. Walau bagaimanapun, kenderaan plaintif tidak pernah diserahkan kepada Jabatan Pengangkutan Jalan tetapi plaintif telah diberitahu secara bertulis bahawa kes plaintif selanjutnya disiasat di bawah Akta tersebut. Ini menunjukkan defendan pertama tidak dapat membuat keputusan dan juga siasatan mereka menemui jalan buntu. Walau apa pun, plaintif adalah pembeli bona fide yang suci hati dan kenderaan yang telah dibaiki tersebutyang disita daripada milikannya telah didaftarkan atas namanya (lihat perenggan 18 & 28). C D E

(2) Pegawai kastam yang mengesyaki kenderaan yang telah dibaiki tersebut sebagai barangan tak berkastam tidak mengikrarkan apa-apa afidavit untuk mendeposkan fakta tersebut. Afidavit keterangannya tidak menunjukkan keadaan yang mencetuskan sebab yang munasabah atau sebab untuk mengesyaki bahawa kenderaan yang telah dibaiki tersebut adalah barangan tak berkastam. Dengan ketiadaan sebab munasabah tersebut, penyitaan dan penahanan kenderaan yang telah dibaiki tersebut tidak sah (lihat perenggan 12).] F

Notes G

For cases on uncustomed goods generally, see 6 *Mallal's Digest* (4 th Ed, 2007 Reissue) paras 237–260.

Cases referred to H

Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd [1986] 1 MLJ 362, FC (refd)

Asia Commercial Finance (M) Bhd v PP [1996] MLJU 519; [1996] 1 LNS 308, HC (refd)

Ketua Polis Ibu Pejabat Kontinjen Seremban, Negeri Sembilan & Anor v Manoharan a/l Dorasamy [2004] 2 MLJ 565, FC (refd) I

Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281, CA (refd)

Pesurohjaya Ibu Kota Kuala Lumpur v Public Trustee & Ors [1971] 2 MLJ 30, HC (refd)

A *PP v Mat Nawi bin Ismail* [1987] 2 MLJ 366; [1987] 2 CLJ 83, HC (refd)
Syarikat Raspand (suing as a firm) v Government of the State of Sabah [2005] 7 MLJ 576; [2005] 7 CLJ 179, HC

Legislation referred to

B Criminal Procedure Code s 413
Customs Act 1967 ss 2, 114, 114(1), 115, 115(1)(a), 128, 128(2), (4), 132, 135
Federal Constitution art 13(1)
Road Transport Act 1967 ss 8, 10, 11, 12, 17
C Sabah Forest Enactment 1968 s 37A

Chua Hock Aik (N/A) for the plaintiff.
Tengku Intan Suraya bt Tengku Ismail (Federal Counsel, Attorney General's Chambers) for the defendant.

D

Zamani A Rahim JC:

INTRODUCTION

E **[1]** The subject matter of the plaintiff application herein (encl 1) involved a Honda Civic 1.6 EFI (A) motorcar, chassis No EH5–904503, engine No B16A–3411428 (previously the engine no was ME 516–204497), bearing registration No PDD 8281 (hereinafter referred to as 'the original Honda motorcar').

F

[2] Before the plaintiff acquired ownership of the original Honda motorcar, it had three previous registered owners. They were firstly, O & G Engineering (Utara) Sdn Bhd, registered as the first owner on 6 October 1955, secondly, Encik Tan Meng Seng, registered as the second owner on 14 March 2000, and thirdly, Puan Ang Gaik Ean, registered as the third owner on 2 January 2002.

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INSPECTION OF THE PLAINTIFF'S MOTORCAR

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[3] The plaintiff was the fourth registered owner. It was registered in his name on 12 January 2004 after the original Honda motorcar had undergone major repairs. The second defendant as the Registrar of Motor Vehicles is under a duty to inspect every vehicle submitted for registration or transfer of registration. Section 10 and s 12 of the Road Transport Act 1967 stipulate as follows:

I

Application for registration

10(1)Every application for the registration of a motor vehicle shall be made

in the prescribed form to the Director of a registration area and shall be signed by the person for the time being entitled to the possession of the motor vehicle.

(2) Notwithstanding anything in subsection (1), any person who satisfies the Director that he has been authorized in writing for that purpose by a person who is absent from Malaysia, may make application on behalf of that person for the registration of a motor vehicle, and in any such case the application shall be deemed to have been signed and made by that person.

(3) No motor vehicle shall be registered unless:

(a) such vehicle bears a clear, distinct and untampered engine and chassis number; and

(b) the prescribed fee has been paid.

(4) No motor vehicle shall be registered which does not comply with this Act as to construction, weight, equipment, use and age unless such motor vehicle has been exempted from such compliance under powers conferred by this Act.

(5) An application for the registration of a motor vehicle which is the property of the Government or of a public body shall designate, by reference to his office, an officer in the service of the Government or public body, as the case may be, in whose charge such motor vehicle will be and such person for the time being holding such office shall, for the purpose of any offence, be deemed to be the registered owner of such motor vehicle.

(6) No officer shall be deemed by reason only of subsection (5) to be guilty of an offence committed before the date on which he assumed such office.

Inspection of motor vehicles and information Director General

12(1) The Director General, a Director may at any time before registration of a motor vehicle require the motor vehicle to be brought to any convenient place specified by him and to be inspected and, if necessary, to be weighed and measured and after registration may at any time require a motor vehicle to be brought as aforesaid if he has reason to believe:

(a) that the motor vehicle does not comply with the requirements of this Act;

(b) that any information furnished to him in respect of the motor vehicle is false, incorrect or misleading;

A (c) that the motor vehicle is not in a serviceable condition; or

(d) that the weight, dimensions, character, construction, colour, identifying particulars or seating accommodation have been altered after the registration thereof.

B (2) The registered owner of a motor vehicle shall forthwith inform the Director in writing of any circumstance or event which affects the accuracy of any entry in the register relating to the motor vehicle, and shall at the same time forward or deliver to the Director the registration certificate relating to such motor vehicle.

C (2A) The registered owner shall, in the case of a change of chassis of a motor vehicle, obtain the prior approval of the Director General before such change.

D (3) The registered owner of a motor vehicle shall, whenever required by a Director so to do:

(a) forthwith furnish to the Director all such information as he may require for the purpose of verifying the entries relating to such E motor vehicle in the register; and

(b) forthwith forward or deliver to the Director the registration certificate relating to such motor vehicle.

F (4) After a motor vehicle has been inspected, weighed or measured under subsection (1), or upon receipt of any information or proof furnished in respect of a motor vehicle under subsection (2) or (3), the Director may make such amendments in the register and in the registration certificate relating to such motor vehicle as he may consider necessary, and shall return the registration certificate to the registered G owner.

(5) Any person who without reasonable excuse fails to comply with any requirement of the Director General, a Director or a licensed registrar under subsection (1) or with subsection (2) or (3) shall be guilty of H an offence.

REPLACEMENT OF ENGINE NUMBER

I **[4]** While the original Honda motorcar was in the possession of the third registered owner, Puan Ang Gaik Ean, it was involved in a road accident on 18 April 2002. It was badly damaged. Puan Ang Gaik Ean had submitted a 'Total Loss Claim' to the insurers, Syarikat Kurnia Insurans (M) Bhd. The claim was duly paid to her in the sum of RM51,000.

[5] The badly damaged original Honda motorcar was sold by Syarikat Kurnia Insurans (M) Bhd to Syarikat Chin Huat Motor Sdn Bhd at a price of RM15,500 by way of tender.

[6] After the damaged original Honda motorcar was satisfactorily repaired, the plaintiff bought the same at the purchase price of RM30,000 (hereinafter referred to as 'the repaired Honda/plaintiff's motorcar'). The plaintiff has since fully settled its purchase price. At the risk of repetition, the repaired Honda/plaintiff motorcar was duly registered in the name of the plaintiff on 12 January 2004. Upon application by the plaintiff to the Road Transport Department (RTD), Penang, the engine of the repaired Honda/plaintiff's motorcar was replaced. The replacement of the engine was duly approved by the second defendant pursuant to s 17 of the Road Transport Act 1967 which provides as follows:

17 Director may refuse to issue motor vehicle licenses in certain cases

(1) A Director shall not be required to grant any motor vehicle licence for which application is made unless:

(a) the registration certificate relating to the motor vehicle specified in such application is produced and the particulars contained in such application are identical with the corresponding particulars contained in such registration certificate;

(b) the identifying particulars of the motor vehicle, including the engine and chassis number, remain clear, distinct and untampered and are identical with the corresponding particulars contained in such registration certificate;

(c) the prescribed fee has been paid; and

(d) he is satisfied that the applicant has no outstanding matter or case with the Road Transport Department or the Police relating to any contravention of or offence against this Act or the Commercial Vehicles Licensing Board Act 1987. [Am. Act A973]

(2) ...

(3) ...

(4) ...

(5) ...

(6) ...

(7) ...

(8) ...

[7] For the purpose of s 12, the repaired Honda/plaintiff's motorcar was brought to the second defendant to be inspected and to be weighed and measured, if necessary. Further, pursuant to s 17, upon application to change the engine (see exh 'OM1'), the registration certificate was produced (see exh 'CSC1') to the second defendant. The second defendant was further duty bound to ensure that (a) the particulars contained in the application form (see exh 'OM1') are identical with the corresponding particulars contained in the registration certificate, and (b) the identifying particulars of the repaired Honda/plaintiff's motorcar, including the engine and chassis number remain clear, distinct, and untampered and are identical with the corresponding particulars contained in the registration certificate. If physical structures of the repaired Honda/plaintiff's motorcar are not identical to its registration certificate and the RTD register, the second defendant is under a duty to withhold its approval or to make the necessary amendments. In this case, the second defendant only made the amendment in respect of the engine number in the registration certificate. The old engine No ME 516–2–4497 was cancelled and replaced by the new engine No B16A–3411428 (see exh 'CSC1' in the plaintiff supporting affidavit affirmed on 25 April 2006). Therefore, if there are any discrepancies between the physical structures of the repaired Honda/plaintiff's motorcar and its registration certificate or the RTD records, the plaintiff is not to bear the brunt.

SEIZURE OF THE PLAINTIFF'S MOTORCAR

[8] Having used the repaired Honda/plaintiff's motorcar peacefully and without interruption for almost two years, the said motorcar was on 24 January 2006, detained and seized by an officer of custom from Jabatan Kastam Diraja Malaysia, Sungai Petani. The ground of seizure and detention was for further investigation into the repaired Honda/plaintiff's motorcar as its was suspected to be uncustomed goods under the Customs Act 1967. The first defendant power to seize goods which contravene the Customs Act 1967 is stipulated in s 114 as follows:

> 114 Seizure of goods the subject of an offence
>
> (1) All goods in respect of which there has been, or there is, *reasonable cause to* suspect that there has been committed any offence against this Act or any regulation made thereunder, or any breach of any of the provisions of this Act or of any regulation made thereunder or of any restriction or condition subject to or upon which any licence or permit has been granted, together with any receptacle, package, conveyance, vessel not exceeding two hundred tons nett registered tonnage, or aircraft other than an aircraft engaged in international carriage, in which the same may have been found or which has been used in connection with such offence or breach, and any books or

documents which may reasonably be believed to have a bearing on the case, may be seized by any officer of *customs* in any place either on land or in territorial waters.

(Emphasis added.)

[9] The power to seize the repaired Honda/plaintiff's motorcar under s 114(1) would only arise if there is *reasonable cause to suspect* that the plaintiff motorcar is uncustomed goods. 'Uncustomed goods' is defined in s 2 to mean goods in respect of which a breach of the provisions of the Act or of any subsidiary legislation made thereunder has been committed. I am not unminded that whether reasonable ground of suspicion actually existed would entirely depend on or within the domain of normally the custom officer who seized the goods, be it uncustomed, dutiable or prohibited. The reasonable cause of suspicion may arise in various circumstances. For example, in *Public Prosecutor v Mat Nawi bin Ismail* [1987] 2 MLJ 366; [1987] 2 CLJ 83, the goods were reasonably suspected to be dutiable. The facts are these. The respondent drove a car. He failed to stop when asked to do so at the customs road block. The customs chased the car. He abandoned the car and ran away. Dutiable goods were found in the car. The same morning the respondent surrendered himself. The respondent claimed that he was transporting the goods found in the car to another person. He disobeyed the customs requiring him to stop because he had thought duty had not been paid on those goods. Subsequently, he produced receipts indicating that payment of duties had been made on the goods. The customs then released the goods to him. The car was however detained. KC Vohrah J said:

> However if there are goods in the car, the power to seize the vehicle under s 114(1) may arise. This power would only arise if there is reasonable cause to suspect that in respect of these goods there has been committed an offence against the Act or any regulation made thereunder.
>
> In the present case, the car was abandoned after a chase. Goods were found in the car. And they were *reasonably suspected to be dutiable* and therefore the car was *lawfully* seized. But the goods were subsequently released upon proof that duty had been paid on them. No offence having been committed in respect of these goods, the car should then have been released. No question of forfeiture arises under s 127 of the Act in the circumtances. I accordingly confirm the order of the magistrate returning the car to the respondent.
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> (Emphasis added.)

[10] In this case, it has not be shown the relevant circumtances where reasonable grounds of suspicion had arisen to suspect that the repaired Honda/plaintiff's motorcar was uncustomed goods. In his affidavit in reply,

A one Md Naeyem bin Abdul Mutalib, *Penguasa Kastam, Jabatan Kastam Diraja Malaysia, Bahagian Pencegahan,* Sungai Petani affirmed on 21 August 2006 at para 6 states, inter alia:

> ... Seterusnya saya menyatakan bahawa kenderaan plaintif telah ditahan oleh pihak
B kastam untuk siasatan lanjut setelah *disyaki ianya adalah barangan tak berkastam* di bawah Akta Kastam 1967.

[11] In his further affidavit affirmed on 9 February 2007, at para 6 states,
C inter alia:

> ... kenderaan plaintif telah ditahan setelah wujud sebab yang munasabah untuk *mengesyaki bahawa kenderaan tersebut adalah barangan belum lulus kastam* ...
>
> (Emphasis added.)

D

[12] It was unclear whether Md Naeyem bin Abdul Mutalib was the custom officer who possessed reasonable grounds that the repaired Honda/plaintiff's motorcar was uncustomed goods and seized it. Nowhere in
E his affidavit evidence and the exhibits annexed thereto to show circumtances to trigger reasonable cause or reason to suspect that the repaired Honda/plaintiff's motorcar was uncustomed goods, an offence committed under the Customs Act or any regulation made thereunder. The reasonable cause of suspicion must exist before or at the time seizure is effected. In the
F absence of such reasonable cause, the seizure and detention of the repaired Honda/plaintiff's motorcar is therefore unlawful, contrary to art 13(1) of the Federal Constitution which provides as follows:

> No person shall be deprived of property save in accordance with law.

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[13] If I am wrong, there was no evidence shown that the repaired Honda/plaintiff's motorcar was uncustomed goods. Upon seizure of the repaired Honda/plaintiff's motorcar, it was immediately sent to the
H Department of Chemistry Malaysia at Penang for examination. It was certified that firstly, the entire panel of the chassis was cut and had been replaced, and secondly, the *engine number* which read *B16A–541428* was not tampered.

I **[14]** On 9 March 2006, the repaired Honda/plaintiff's motorcar was taken to Syarikat Oriental Assemblers Sdn Bhd, at Johor Bharu. Syarikat Oriental Assemblers Sdn Bhd is presumably the assembler of the Honda motorcars in Malaysia (hereinafter referred to as 'the assembler'). On examination by the assembler, it was revealed that its *chassis No EH5–904503* was the original

number, but other features of the plaintiff motorcar were not the same as in assembler's records. The assembler certified that the plaintiff motorcar was *not produced* by them.

[15] But the RTD records disclosed that the repaired Honda/plaintiff's motorcar was locally assembled (*pemasangan tempatan*). To this, the first defendant argued that the particulars in the RTD records were related or belonged to the original Honda motorcar and not the repaired Honda/plaintiff's motorcar. The chassis number of the repaired Honda/plaintiff's motorcar was taken from the original Honda motorcar. However, its physical features were believed by the first defendant to have been imported and thus uncustomed goods. But its importer was unknown and unidentified.

[16] As regard, the repaired Honda/plaintiff's motorcar was locally assembled, the first defendant conceded that such particulars were indeed taken from the RTD records. And went on to say that the second defendant did not carry out physical examination on the repaired Honda/plaintiff's motorcar (see para 6.5 at pp 16 and 17 of the defendants' written submission). Here again the plaintiff could not be blamed for any inconsistencies or discrepancies found on the repaired Honda/plaintiff's motorcar in comparison to its registration certificate or the RTD records as they should be detected or ought to be have been defected by the second defendant.

WRITTEN NOTICE FOR THE RETURN OF THE PLAINTIFF'S MOTORCAR

[17] As the first defendant investigation in respect of the repaired Honda/plaintiff's motorcar could not identify the offender that has committed the offence under the Customs Act 1967 or any regulation made thereunder, no prosecution was levied against anyone. The plaintiff, being the current registered owner of the said motorcar sought its return under s 115. Sub-section (1)(a) of s 115 reads as follows:

> 115 *Return* or *disposal* of movable property
>
> (1) Where any movable property has been seized under this Act, a senior officer of customs may, at his discretion:
>
> (a) temporarily return the movable property to the owner thereof or to the person from whose possession, custody or control it was seized, or to such person as a senior officer of customs may consider entitled thereto, subject to such terms and conditions as a senior officer a customs may impose, and, subject, in any case,

A to sufficient security being furnished to the satisfaction of a senior officer of customs that the movable property shall be surrendered to a senior officer of customs on demand being made by a senior officer of customs and that the said terms and conditions, if any, shall be complied with; or

B (b) ...

[18] The plaintiff's counsel, pursuant to s 128(2) wrote a written notice C dated 19 February 2006 informing the first defendant that the plaintiff was served with the chemist report and also the plaintiff's counsel was informed by one Tuan Haji Othman Jusoh, *Ketua Bahagian Pencegah*, Sungai Petani that no offence had been committed in relation to the repaired Honda/plaintiff's motorcar under the Customs Act 1967. However, the said D Tuan Haji Othman proposed that the repaired Honda/plaintiff's motorcar would be handed over to the second defendant for investigation under the Road Transport Act. The plaintiff objected to such a course as the plaintiff's motorcar was taken into custody for being suspected to be uncustomed goods under the Customs Act 1967 (see exh 'CSC 4' annexed to the plaintiff's E affidavit in support affirmed on 25 April 2006). The said Tuan Haji Othman did not dispute or contradict the plaintiff's allegation in exh CSC 4. It is usually treated as an admission or acceptance on his part (see Court of Appeal case of *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 and Federal Court case of *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn* F *Bhd* [1986] 1 MLJ 362). However, the plaintiff's motorcar was never handed over to RTD, instead of the first defendant vide their letter dated 20 June 2006 informed the plaintiff that the plaintiff's case was still being investigated under the Customs Act 1967. This showed the first defendant indecisiveness and their investigation was coming to a dead end. In fact, the last G investigation carried out by the first defendant on the repaired Honda/plaintiff's motorcar was on 9 March 2006 when it was examined by the assembler. Since then, the repaired Honda/plaintiff's motorcar remained in the custody of the first defendant. No further action was taken thereafter on the said motorcar.

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[19] The plaintiff's counsel sent a second letter dated 13 March 2006 to the first defendant pointing out the RTD records showed that the repaired Honda/plaintiff's motorcar was locally assembled (*pemasangan tempatan*) and therefore the provisions of the Custom Act 1967 were inapplicable. This I letter also reminded the first defendant that the repaired Honda/plaintiff's motorcar was properly registered in the plaintiff's name. Therefore, the duty is imposed on the RTD as the Registrar of Motor Vehicles to inspect the repaired Honda/plaintiff's motorcar submitted for registration or transfer of registration in accordance with ss 8, 10, 11 and 12. And the plaintiff was a

bona fide purchaser in good faith. The plaintiff's counsel requested the repaired Honda/plaintiff's motorcar to be returned immediately, failing which proceedings would be filed in the court. The plaintiff received similar reply from the first defendant in that the investigation was still pending under the Custom Act 1967.

[20] A third letter dated 16 March 2006 was sent by the plaintiff's counsel to the first defendant requesting the repaired Honda/plaintiff's motorcar to be released under s 115 pending completion of the investigation. But this time there was no reply forthcoming from the first defendant. The first defendant's failure to temporarily released the repaired Honda/plaintiff's motorcar to the plaintiff, the first defendant had failed to exercise their discretion fairly in the circumstances of this case under sub-s 1(a) of s 115.

[21] Dissatisfied with the first defendant action, the plaintiff had, on 7 May 2006, filed an originating summons vide No 24–805 of 2006 seeking declarations and damages as follows:

(a) Satu deklarasi bahawa plaintif merupakan tuan punya berdaftar kereta PDD 8281 yang sah dan bahawa defendan pertama dan defendan kedua tiada hak untuk mengganggu hak plaintif di bawah perkara 13(1) Perlembagaan Persekutuan dan Akta Pengangkutan Jalan 1987 dan peraturan di bawah Akta tersebut.

(b) Satu deklarasi bahawa pendaftaran kereta tersebut oleh defendan kedua dengan No Pendaftaran PDD 8281 dengan No Enjin BIGA-5411428 No Casis EH5-904503 yang dibuat pada 6 October 1995 dan atau 21 Januari 2004 di bawah s 10 Akta Pengangkutan Jalan adalah sahlaku dan mengikat defendan-defendan.

(c) Satu deklarasi bahawa penahanan kereta milikan plaintif oleh defendan pertama adalah tidak sah dan mala fide.

(d) Bahawa defendan pertama melepaskan kereta PDD 8281 kepada plaintif tanpa syarat dan defendan kedua mengisu cukai jalan yang sah bagi motokar PDD 8281 tersebut.

(e) Bahawa bayaran ganti rugi diberi oleh defendan pertama kepada plaintif kerana telah menghindar hak plaintif di bawah perkara 13(1) Perlembagaan Persekutuan dan Penolong Kanan Pendaftar Mahkamah diperintahkan untuk menentukan jumlah ganti rugi.

DAMAGES

[22] As adverted to earlier, the seizure of the repaired Honda/plaintiff's motorcar by the officer of custom was made without reasonable cause or

grounds. After the seizure, the investigation conducted by the first defendant did not establish that the repaired Honda/plaintiff's motorcar was uncustomed goods. For that reason, no prosecution was instituted against anyone, including the plaintiff under s 135.

[23] As there was no reasonable cause before or at the time of seizure to justify the detention or continued detention of the repaired Honda/plaintiff's motorcar, the plaintiff is entitled, not only, for an order that the repaired Honda/plaintiff's motorcar be returned to him but also damages. Section 132 provides as follows:

> 132 No cost of damages arising from seizure to be recoverable unless seizure without reasonable or probable cause.
>
> No person shall in any proceedings before any court in respect of the seizure of any goods seized in exercise or the purported exercise of any power conferred under this Act, be entitled to the costs of such proceedings or to any damages or other relief other than an order for the return of such goods or the payment of their value unless such seizure was made without reasonable or probable cause

[24] Section 132 above is identical to s 37A of the Sabah Forest Enactment 1968 which was considered in the case of *Syarikat Raspand (suing as a firm) v Government of the State of Sabah* [2005] 7 MLJ 576; [2005] 7 CLJ 179. There the court held that the seizure was unlawful albeit on different grounds.

THE MATTER WAS REFERRED TO THE MAGISTRATE

[25] After two months the plaintiff filed the originating summons in this court, the first defendant had referred the plaintiff's matter under s 128(4) to the magistrate at the Magistrate Court George Town, Penang vide Miscellaneous Application No 82–92 of 2006. Section 128 reads as follows:

> 128 *Goods seized in respect of* which there is *no prosecution, or the proceeds of sale thereof,* are forfeited if *not claimed within one month*
>
> (1) If there be no prosecution with regard to any goods seized under this Act, such goods or the proceeds of sale of such goods which are held pursuant to paragraph (c) of subsection (1) of section 115 shall be taken and deemed to be forfeited at the expiration of one calendar month from the date of seizure of the goods unless, before such expiration:
>
> (a) a claim to such goods or the proceeds of sale of such goods is made under subsection (2);

(b) a written application is made for the return of such goods under paragraph (a) or (b) of subsection (1) of section 115; or

(c) such goods are returned under the said paragraph (a) or (b).

(2) Any person asserting that he is the owner of such goods or the proceeds of sale of such goods, as the case may be, and that they are not liable to forfeiture may give written notice to a senior officer of customs that he claims the same.

(3) On the expiration of the period mentioned in subsection (1), or, if decision is made earlier that there be no prosecution with regard to the goods, on the making of the decision the senior officer of customs shall, if such goods or the proceeds of sale of such goods are not taken and deemed to be forfeited under that subsection, refer the claim to the Director General who may direct that such goods or the proceeds of sale of such goods or the security furnished under paragraph (a) or (b) of subsection (1) of section 115, as the case may be, be released or may direct such senior officer of customs, by information in the prescribed form, to refer the matter to a Magistrate of the First Class for his decision.

(4) The Magistrate of the First Class shall issue a summons requiring the person asserting that he is the owner of the goods or the proceeds of sale of such goods, and the person from whom the goods were seized, to appear before him, and upon their appearance or default to appear, due service of such summons being proved, the Magistrate of the First Class shall proceed to the examination of the matter, and upon proof that an offence against this Act or any regulations made thereunder has been committed and that such goods were the subject matter, or were used in the commission, of such offence, shall order such goods or the proceeds of sale of such goods or the amount secured under paragraph (a) or (b) of subsection (1) of section 115, as the case may be, to be forfeited, or in the absence of such proof, may order the release of such goods or the proceeds of sale of such goods or the security furnished under paragraph (a) or (b) of subsection (1) of section 115, as the case may be.

(5) In any proceedings under subsection (4), section 119 shall apply to the person asserting that he is the owner of the goods and to the person from whom they were seized as if such owner or person had been the defendant in a prosecution under this Act.

(Emphasis added.)

[26] Akin to s 413 of the Criminal Procedure Code ('CPC'), the duty imposed by s 128(4) on the learned magistrate to issue a summons to order

A the delivery of the property after holding an enquiry is mandatory (see *Asia Commercial Finance (M) Bhd v Public Prosecutor* [1996] MLJU 519; [1996] 1 LNS 308). The argument of senior federal counsel for the defendants may be summarised on two grounds, firstly, this court has no jurisdiction to hear and decide the plaintiff's application herein as the jurisdiction was solely B vested in the magistrate under s 128(4) (see *Ketua Polis Ibu Pejabat Kontinjen Seremban, Negeri Sembilan & Anor v Manoharan a/l Dorasamy* [2004] 2 MLJ 565). Secondly, the plaintiff's action should begun by way of writ and not by originating summons as there are substantial dispute of facts (see *Pesurohjaya Ibu Kota Kuala Lumpur v Public Trustee & Ors* [1971] 2 MLJ 30). I find these C arguments are without merit in the circumstances of this case.

[27] At the hearing of the enquiry at the Magistrate's Court, George Town on 9 August 2006, the plaintiff's counsel informed the learned magistrate that the plaintiff's application involved the same subject matter, that is, a D Honda Civic motorcar, PDD 8281 which was pending in this court. The learned magistrate adjourned the enquiry. It was also submitted by the plaintiff's counsel that the enquiry before the learned magistrate was subsequently struck off as it was withdrawn by the defendants. Therefore, there is no enquiry to be heard by the learned magistrate under s 128(4). The E defendants' motive for taking the matter to the magistrate court, albeit belatedly is perhaps to adopt the view of Abdul Malek Ahmad FCJ in respect of the magistrate's power in s 413 of the CPC enunciated in *Manoharan a/l Dorasamy*'s case. But why the enquiry was subsequently withdrawn at the behest of the defendants is hard to understand. The defendants appear to be F uncertain in their action. Their action smacks mala fide.

[28] The cumulative facts and circumstances in this case are: the repaired Honda/plaintiff's motorcar was never clearly established that it was G uncustomed goods; the custom officer who suspected the repaired Honda/plaintiff's motorcar to be uncustomed goods did not appear to affirm any affidavit to depose that fact; there was no dispute that the plaintiff was a bona fide purchaser in good faith; the repaired Honda/plaintiff's motorcar was registered in the plaintiff's name and the motorcar was seized from his H possession.

[29] I would, therefore, allow the orders sought by the plaintiff in encl 1 with costs.

I ADDENDUM

[30] Dissatisfied with my decision, the defendants had filed summons in chambers dated 2 June 2008, encl 26 pending appeal to the Court of Appeal vide K-01–55 of 2008.

[31] Subsequently, the summons in chambers was discontinued and withdrawn by the defendants on 26 November 2008.

Plaintiff's application allowed with costs.

Reported by K Nesan